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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 899

JOHN M. KEARNEY, *Petitioner*,

— v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	15
Conclusion	23
Appendix A	1a
Appendix B	2a

CITATIONS

CASES:

Bridges v. *Wixon*, 326 U. S. 135, 154 20
Brown v. *United States*, No. 50362, decided October 8, 1958 and unreported 22
Den ex dem Murray v. *Hoboken Land & Improvement Co.*, 18 How 272, 280-281 19
Egan v. *United States*, 158 F. Supp. 377 22
Elchibegoff v. *United States*, 106 C. Cls. 541, 550 20
Federal Trade Commission v. *National Lead Company*, 352 U. S. 419, 427 20
Gonzales v. *United States*, 348 U. S. 407, 413 20
Interstate Commerce Commission v. *Louisville & Nashville RR*, 227 U. S. 88, 93 19
Jay v. *Boyd*, 351 U. S. 345, 358 18
Joint Anti Fascist Committee v. *McGrath*, 341 U. S. 123, 168-170 19
Morgan v. *United States*, 304 U. S. 1, 22 18
Ohio Bell Telephone Co. v. *Public Utilities Commission*, 301 U. S. 292, 300-301 20
Peters v. *Hobby*, 349 U. S. 331, 345 17
Proper v. *United States*, 139 C. Cls. 511 ..... 15, 17, 21

Page

Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393 19

Rex v. *Justices of Bodmin* (1947), 1 K. B. 321, 325 ..... 22, 23

St. Joseph Stockyard Co. v. *United States*, 298 U. S. 38, 73 19

United States v. *Abilene and So. Ry. Co.*, 265 U. S. 274, 289 19

STATUTES:

Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 34 U. S. C. 855(c)(1) 2

Act of June 17, 1948, c. 497, § 1 (b), 62 Stat. 477, 34 U. S. C. 417 2

Section 207 of the Legislative Reorganization Act of 1946, as amended by the Act of October 25, 1951, 65 Stat. 655, 5 U. S. C. 191(a) 2, 5, 6, 15, 16, 17, 18

MISCELLANEOUS:

Constitution of the United States, Fifth Amendment 2

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No.

JOHN M. KEARNEY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, John M. Kearney, prays that a writ of certiorari issue to the United States Court of Claims.

OPINIONS BELOW

The Opinion of the Court of Claims dated December 4, 1957 is reported in 156 F. Supp. 928. The Order of the Court overruling plaintiff's motion for rehearing is dated February 11, 1959.[1] Both are printed in Appendix B, *infra*.

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[1] Refere[illegible](Ex.)" are to the Exhibits filed with the Record, exce[illegible]its 1 to 3, inclusive, are three affidavits attached to the certified transcript of Record.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Navy, acting pursuant to statute through his civilian Board for the Correction of Naval Records, adopted procedures which requested and obtained three advisory opinions for use by said Board from Officers of the Naval Medical Corps as to Petitioner's incapacity for active duty for retirement purposes, two of such advisory opinions being secret, and one of them requested and received 52 days after the Hearing, does so in violation of the Fifth Amendment to the Constitution?

2. Whether the Secretary of the Navy, acting pursuant to statute through his civilian Board for the Correction of Naval Records and Officers of the Naval Medical Corps, acted arbitrarily and capriciously and contrary to the law when he determined that Petitioner was physically fit for release from active duty on October 17, 1946?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case involves:

(1) The Fifth Amendment to the Constitution of the United States printed in Appendix A, *infra*, 1a.

(2) Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 24 U. S. C. 855(c), printed in Appendix A, *infra*, 1a.

(3) Act of June 17, 1948, c. 497, § 1(b), 62 Stat. 477, as amended, 34 U. S. C. 417, printed in Appendix A, *infra*, 1a.

(4) Section 207 of the Legislative Reorganization Act of 1946, as amended by the Act of October 25, 1951, 65 Stat. 655, 5 U. S. C. 191(a), printed in Appendix A, *infra*, 1a.

STATEMENT OF THE CASE

Succinctly stated, this case involves the denial of retirement benefits, under the most exasperating *secret* administrative procedures to Petitioner, a pilot in the Marine Corps Reserve, which are due him as a result of serious injuries sustained by him in an airplane crash during World War II. (Italics supplied)

Petitioner enlisted in the U. S. Naval Reserve on September 2, 1942. On the following February 4, 1943, he was called to active duty training as an aviation cadet and ordered to report for duty at the U. S. Navy Pre-Flight School at Saint Mary's College, California. He completed his cadet flight training and, on February 18, 1944, was commissioned a 2nd Lieutenant in the U. S. Marine Corps Reserve.

On June 13, 1945, Petitioner sustained serious injuries as a result of a plane crash while the pilot of a plane on a training flight with an aviation cadet. These injuries were as follows: (1) Fracture of the left parietal region of the skull. (2) Fracture simple, right mandible (jaw). (3) Dislocation, carpo-metacarpal joint, right wrist. Petitioner was flown from the scene of the crash, seriously injured, to the U. S. Naval Air Station, Memphis, Tennessee where he remained until August 18, 1945 on which date he was returned to flight duty at the Naval Air Station at Memphis. He immediately failed his flight physical. He was returned to the Naval Hospital where he remained until September 27, 1945 on which date he was again returned to the Naval Air Station for duty and was again promptly grounded. On December 27, 1945, Petitioner appeared before a Board of Medical Survey at the Naval Air Station. It recommended to the Bureau of Medicine and Surgery, Washington, D. C., that Petitioner be transferred to the Maxillo-Facial Center, U. S. Naval Hospital, Philadelphia, Pennsylvania for treatment. Upon the approval of this recommendation, Petitioner arrived at the

said Hospital on February 14, 1946. He was promoted to a First Lieutenant on February 16, 1946. He remained there until May 28, 1946 on which date he was given medical recuperative leave of 30 days. Upon the expiration of this leave, his orders took him to the Naval Air Station, San Diego, California, where, on September 10, 1946, he was released from active duty as physically fit, without consideration being given to his right to retired pay. On the following October 17, 1946, he was Honorably discharged from the Marine Corps Reserve.

Petitioner resigned his Reserve Commission in the Marine Corps on November 7, 1948. Soon thereafter, he applied for a Reserve Commission in the Air Force, and upon being commissioned a Captain therein, he was involuntarily called to active duty on November 22, 1948. He served in the Air Force until July 18, 1950, at which time he was given an Honorable discharge. After the airplane crash on June 13, 1945, plaintiff at no time did any solo flying. While in the Air Force, he was a Weather Officer and later an Air Intelligence Officer.

After Petitioner was Honorably discharged from the Marine Corps on October 17, 1946, the Veteran's Administration, hereafter referred to as the VA, gave him disability ratings from 40% to 70%. The latter 70% rating being dated January 18, 1952, but an earlier disability rating of 50% was made retroactive to October 1, 1948. (Ex. 32)

On July 8, 1952, Petitioner filed a Petition in the Board for Correction of Naval Records, hereinafter referred to as the BCNR, to correct his record to show that he was retired for physical disability upon his release from active duty in the Marine Corps on October 17, 1946. Admittedly, the Secretary of the Navy had the power to do so "acting through boards of civilian officers and employees", as provided in Section 207(a) of the Legislative Reorganization Act of 1946, as amended.

A long time prior to Petitioner's hearing before the BCNR which was opened and concluded on December 21, 1953 (Ex. 7), the BCNR adopted certain procedures, which were in flagrant violation of Section 207(a), as well as in defiance of well-recognized elementary rules governing all adversary proceedings. Two of these procedures were *secret* and one of them even occurred a long time *after the hearing*. In these and other respects, the actions of the Secretary of the Navy were patently arbitrary, capricious, and contrary to law. Petitioner's substantial rights were without the normal safeguards. (Italics supplied)

On June 17, 1953, the BCNR wrote the President of the Physical Disability Appeal Board (Marine Corps), for an advisory opinion as to whether or not Petitioner was incapacitated for active duty when released from active duty in the Marine Corps. It would appear to be a ground for considerable astonishment, that this Board was required to inform BCNR on July 20, 1953 that since Petitioner was released from active duty prior to the passage of the Career Compensation Act of 1949, ". . . referral of this case to the Physical Disability Appeal Board is not in accordance with the approved procedure." (Ex. 4, p. 1, para. 3)

On July 20, 1953, BCNR wrote the President, Naval Retiring Review Board (Marine Corps), for an advisory opinion as to Petitioner's fitness for active duty on October 17, 1946. On July 28, 1953, the said Board found that Petitioner was fit for duty at the time of his release from active duty. All five members of the Board were commissioned officers, three in the Marine Corps, non-medical officers, and two in the U. S. Navy, Medical Corps. (Ex. 5) Petitioner's then Counsel objected to the consideration of this advisory opinion by BCNR. The objection was noted. No attempt was made to discover whether the BCNR had seen this advisory opinion long prior to or during the hearing. The grounds of the objection were specific in

the transcript of the hearing with emphasis upon the fact that the Board consisted of all military personnel whereas Section 207(a) required that the personnel of the Board shall be civilians. (Ex. 7, p. 5) It was also urged that the Board was surly and prejudiced, and this was not without cause. (Ex. 7, p. 6)

On October 15, 1953, BCNR, apparently in need of still another advisory opinion on petitioner's fitness for active duty, made a third request upon a new authority, the Chief, Bureau of Medicine and Surgery, for such an opinion. On November 6, 1953, H. L. Pugh, Chief of such Bureau, rendered such an opinion. In the proceedings below, on Motion for a Rehearing, Petitioner's former Counsel D. le L. Jernberg, Esq., made an affidavit, dated December 1, 1958, in which he stated that "he has no recollection of having previously seen this said letter" of November 6, 1953. (Ex. 2, p. 3) Petitioner's affidavit dated December 2, 1958 stated that he saw the letter of November 6, 1953 for the first time on November 14, 1958 when present Counsel showed it to him. (Ex. 1, p. 2) We can find no reference to it in the transcript of the Hearing. As previously shown, Petitioner's former Counsel objected to the advisory opinion of the Naval Retiring Review Board, so it is unthinkable that he would not have objected to the consideration of this one if it had been made available to him either prior to or during the Hearing. This Pugh advisory opinion was the first of two secret advisory opinions. It was generally so highly prejudicial as to provide a sufficient cause for the then Counsel for Petitioner, had he seen it, to urge that Petitioner abandon his application for relief before the BCNR. This view is taken upon the premise that BCNR had seen it either before or at the Hearing, and human frailities being what they are, Petitioner could entertain no hope of a fair and impartial Hearing.

Petitioner's Hearing before the BCNR was convened and concluded on December 21, 1953. Dr. Marvin Fuchs,

Internist, Diplomate of the American Board of Internal Medicine, Instructor of Medicine at the George Washington University College of Medicine, and Associate Director of the Headache Clinic at the George Washington University Hospital, was called as a witness for Petitioner and testified as did the Petitioner. (Ex. 7, pp. 12-22) No other testimony was offered. The decision of the BCNR dated April 8, 1954 was that "no change, correction, or modification of the Naval Records of John M. Kearney . . . is warranted."

As the Hearing opened one Commander Harvey E. Reitz, Medical Corps, U. S. Navy, entered the Hearing Room and took a seat next to Mr. DeWald, Chr., BCNR. The then Counsel for Petitioner objected to Commander Reitz participating in the Hearing on the grounds that he was a Naval Officer, was disqualified from sitting on the Board since under the law it was to be composed of civilians, and that if BCNR required the assistance of Dr. Reitz that he be called as a witness. The BCNR went into executive session and when it convened announced that it had asked Dr. Reitz to be excused. (Ex. 7, pp. 3-4)

Fifty-two days *after* the Hearing, on February 11, 1954, BCNR wrote to Chief, Bureau of Medicine and Surgery, and stated therein, as follows: (Ex. 8)

> "(1) Dr. Marvin Fuchs, M.D. appeared as a witness for subject officer and testified as to the technical aspects of Petitioner's condition. It is, therefore requested that there be furnished an explanatory memorandum *which will assist the Board in evaluating the medical evidence presented.*
>
> "(2) In order that *final action may be expedited* in this case, it is requested that *your reply be furnished as soon as possible.*" (Italics supplied)

It is no mere coincidence that Petitioner was referred to Dr. Fuchs by Dr. James W. Watts, celebrated brain surgeon and Professor of Neurology at the George Washington

University Medical School, who, like Dr. Fuchs, made the same diagnosis that Petitioner was suffering from post-traumatic headaches, due to a serious head injury, which the VA had discovered was a skull fracture. (Ex. 7, p. 14) (Ex. 30, p. 17) and (Ex. 30, p. 18).

On February 24, 1954, the Chief, Bureau of Medicine and Surgery, rendered an advisory opinion to the BCNR upon the testimony of Dr. Fuchs. (Ex. 9) Dale L. Jernberg, Esq., then Counsel for Petitioner made an affidavit in support of Petitioner's motion for Rehearing in the Court below. As to this letter of February 24, 1954, he stated: (Ex. 2, p. 2)

> "that *on April 30, 1954*, he went to the Board for Correction of Naval Records to make a copy of the decision of the Board which he did in shorthand notes and placed it in plaintiff's file; that *he saw for the first time* a letter dated February 24, 1954, from the Chief, Bureau of Medicine and Surgery, to the Chairman of the Board for Correction of Naval Records; that he made a copy of said letter in shorthand notes and placed it in plaintiff's file; . . ." (Italics supplied)

On August 8, 1958, while in a conference with Petitioner, it was observed that the initials HER appeared in the upper left corner of the said advisory opinion of February 24, 1954. It was then considered possible that these initials might be the initials of Commander Harvey Reitz, who had been previously disqualified from sitting on the BCNR at the Hearing on December 21, 1953. It is interesting to note that the transcript of the Hearing (Ex. 7, pp. 3, 4) before the BCNR refers to the person Reitz *only* as Commander Harvey Reitz or Dr. Reitz, omitting any middle initial he may have had. On August 12, 1958, the Navy Department advised Counsel that the full name of Commander Reitz, who, in the meantime, had been promoted to Captain, was Harvey Edward Reitz, Medical Corps, USN. Later, on October 10, 1958, Counsel personally examined a Navy Register dated January 1,

1958. It listed Captain Harvey Edward Reitz, MC, USN, as the only medical officer of the rank of Captain with the initials HER. Further, both Mr. Jernberg and Petitioner informed Counsel that they did not know that the initials of Captain Reitz were on the letter of February 24, 1954. (Ex. 9) Petitioner in the Court below presented this as newly discovered evidence in support of his Motion for Rehearing, and Respondent below took no exceptions to any of the facts recited herein. However, this advisory opinion of February 24, 1954, as above described by Mr. Jernberg in his affidavit; was, so he states, seen by him, "on April 30, 1954 . . . for the first time." The decision of the BCNR is dated April 8, 1954 with the obvious result that the first knowledge Mr. Jernberg had of the existence of such an advisory opinion was 22 days *after* BCNR had decided Petitioner's case. (Ex 2) Unquestionably, this advisory opinion, like the advisory opinion by H. L. Pugh, dated November 6, 1953, was a secret advisory opinion. The Pugh advisory opinion disposes of the skull fracture sustained by Petitioner by omitting any reference to it and substitutes in lieu thereof the injuries of, "multiple contusions, lacerations and abrasions." (Ex. 6, p. 1) No claim has been made at any stage of the proceedings that such injuries are even compensable, much less of such substance as would entitle Petitioner to retired pay. This evasive approach to the skull fracture is beyond all of our comprehension for the reason that the opinion itself shows by "Encl (4)" that the "Veterans Administration Medical records", were before Dr. Pugh. Such medical records show that the VA took an X-ray of Petitioner's skull on July 23, 1947 (Ex. 20) and that such X-ray shows Petitioner had a skull fracture. (Ex. 21) This is the only X-ray taken of Petitioner's skull, and it is not without significance to observe that at no time or place has the Navy Medical Staff made any attempt to explain why the Navy failed to X-ray Petitioner's skull, though warned to do so by Lieutenant Biggs, who was the first medical officer

to examine Petitioner immediately following the plane crash on June 13, 1945. (Ex. 13, p. 3) However, Petitioner did not know that the above X-ray taken by the VA had shown him to have a skull fracture until after his release from the Air Force in 1950. (Ex. 7, p. 43) (Ex. 1, p. 1)

The Pugh secret advisory opinion states as to medical examination of Petitioner dated June 9, 1950 as follows: (Ex. 6, p. 3)

> "On June 9, 1950 it appears that the headaches became frequent but pertinent at this point is the fact that he was under an investigation by the U. S. Air Force for allegedly falsifying certain records, which is stress of a sufficient degree to give rise to so-called tension headaches."

But, unfortunately, the secret advisory opinion did not recite all the material parts of the report of this medical examination and the highly significant part of the omission, when considered in light of what was inserted in lieu thereof, gives rise to a belief such might have been done by deliberate design. It could not escape injuring Petitioner, a disabled veteran. It further assigned one cause of the headaches, that is "under an investigation by the U. S. Air Force for allegedly falsifying certain records," whereas the full report of the medical examination cited quite another, namely, "accident (airplane crash) in 1945." Ironically, the full report of this medical examination of June 9, 1950 appeared in Examiner Pons' brief (Ex. 30, p. 12) but it could neither be of benefit to Petitioner nor serve any useful purpose as to *what* the Pugh advisory opinion had to say about Petitioner, for the simple reason Petitioner did not know of the secret Pugh advisory opinion. In the area of pure conjecture, could either Dr. Pugh or more particularly Examiner Pons have known that, due to the aforesaid method that was adopted, Petitioner was helpless. One cannot refute something which

is kept a secret from him. The full medical examination of June 9, 1950 stated as follows: (Ex. 30, p. 12)

> "Headaches for the past several mos. getting worse. In accident in 1945 and had head injury with same type of headaches. Headaches generalized, gets nauseous with it, and at times vomited. Vision is blurred when headaches occur."

This report recited that due to headaches caused by a head injury sustained in an accident in 1945, Petitioner suffered with nausea, vomiting and blurred vision. The Pugh opinion ignoring all of these consequences gave none flowing from the headaches except stress. It also overlooked a little matter of any explanation of what caused the headaches from the time of the airplane crash on June 13, 1945, to the date of the medical report of June 9, 1950, as well as the reason the Air Force waited without taking any action, then lastly, without taking any action gave Petitioner as much as any officer, with a good record, can hope to receive, an Honorable Discharge. As to the statement that the Petitioner "was under an investigation by the U. S. Air Force for allegedly falsifying certain records," as we told the Court below, Petitioner's personnel record had been transferred from the Marine Corps to the Air Force shortly prior to the time he entered the Air Force on November 22, 1948. Nothing whatsoever was done about the inaccuracy of these records until soon after February 28, 1950. However, on February 28, 1950, about 16 months after the personnel records had gone to the Air Force, Petitioner was ordered to instruct his enlisted personnel to stop talking about some pornographic films which had been shown the previous night in the Old Hospitality Hall in the Christian Heurich Brewery in Georgetown. Plaintiff refused to do so and soon thereafter the accuracy of these personnel records was revived. Nevertheless, on July 18, 1950, the Air Force gave Petitioner an Honorable Discharge. The insertion of this material in a secret advisory medical opinion was inde-

fensible. Beyond peradventure, any experienced physician and/or Naval Officer with modest rank should know that its inclusion in the opinion was so grossly erroneous as to give some ground for one to imply bad faith. Since Petitioner was not given a physical examination at any time by any of these medical authorities, the Pugh advisory opinion went far beyond the Petitioner's medical records, none of which made any reference to his Marine Corps personnel records. The BCNR or its Examiner Pons owed Petitioner the duty of deleting it from the secret advisory opinion. Plainly, the Pugh secret advisory opinion in its reference to the report of the medical examination of June 9, 1950, changed its whole meaning by acts of commissions as well as omission. Obviously, the changed version of this report was highly prejudicial.

The Reitz advisory opinion with no showing of qualifications as an expert in the area of skull fractures, deals only with Petitioner's skull fracture. He places chief reliance upon an excerpt in a textbook which quotes from another textbook. The textbook quoted recited that the authors found that between one-third and one-half of all persons who injure their heads sufficiently to warrant hospitalization develop chronic post-traumatic headaches. They studied 63 such patients, all of whom were known to have no ". . . parenchymatous (brain) hemorrhage at the time of observation." Plainly, Petitioner's case is outside the rule of the 63 cases for Dr. Fuchs, who, unlike Dr. Reitz, had repeatedly examined him, testified that his case *did* involve a "bleeding process" (Ex. 7, p. 21) and that such had to do with the small capillaries (Ex. 7, p. 19), further describing the mild and extreme consequences of such bleeding. Both the Pugh and Reitz opinions assigned several causes for the headaches other than a fracture of the skull, and these included everything from a "sore throat" to "secondary gain." The third paragraph of the Reitz opinion misquotes Dr. Fuchs' testimony at the Hearing. (Ex. 7, p. 21) The fourth

paragraph speaks of the unlikelihood of a post-traumatic syndrome, due to organic brain changes, developing 5 or 6 years after an injury. We can find not a whit of evidence that any such position has been taken by either Dr. Fuchs or Dr. Watts.

The decision of the BCNR merely translated the fracture of the skull into the words, "or headaches", hence no disability. The decision stated: (Ex. 10, p. 4 s and t)

> "(s) That Petitioner did suffer *some limitation* of motion of his wrist and a fractured mandible with resulting malocclusion."
>
> "(t) That the evidence presented to the Board does not establish that the defects described in (s) above, *or Petitioner's headaches*, incapacitated him to perform the duties of his rank." (Italics supplied)

These advisory opinions and the decision of BCNR completely ignore the expert opinions of both Dr. Fuchs and more particularly Dr. James W Watts. (Ex. 10, p. 2, para. 5). (Ex. 30, pp. 17-18) The authors of both of these advisory opinions would have to have much, much more than is contained in them to discredit Dr. Watts. But the decision of the BCNR (Ex. 10, p. 4 q) does state that the VA on March 10, 1952, assigned Petitioner a combined disability rating of 70%, and included in the injuries mentioned are following words, "encephalapathy, traumatic, following depressed fracture, left parietal bone." But what the BCNR failed to include, and they knew it, is that the first evaluation of Petitioner's disability was 50% which included the fracture of the mandible and the dislocation of the meta-carpal bones of the right wrist and such disability of 50% was made retroactive to October 1, 1948. This was almost two months before the Air Force called Petitioner to active duty. A mere glance at his medical records would then have disclosed the above two serious injuries, and the fracture of the skull as established by the X-ray taken by the VA. In these cir-

cumstances, the Air Force would not have called him to active duty. Such is also true if Navy Medical had taken an X-ray of his skull at any time while he was in the Marine Corps.

The Pugh advisory opinion surprisingly refers to the loss of motion of the right wrist at only 10% and a "diminished grip strength," (Ex. 6, p. 2). As to the injury of the fractured right mandible, a quotation is taken from a medical examination dated May 22, 1946, as follows:

> "apparently continuation of muscle exercises is clearing up the slight residual tendency for deviation of the mandible. The malocculsion and associated discomfort no longer exists."

In light of the substance of the following three examinations, it would appear that the examination of May 22, 1946 "was superficial in the extreme." The decision of the BCNR states: (Ex. 10, p. 4 s) "That Petitioner did suffer *some* limitation of motion of his right wrist and a fractured mandible with resulting malocclusion." On February 7, 1951, Commander Dunn, MC, USN, fixed the loss of all four forms of motions of the wrist as varying from 28% to 40%, with loss of grip strength and pinch strength at 50% and 90% loss of claw strength. (Ex. 27) Earlier, on July 17, 1950, Major Webb, MC, Air Force, fixed the loss of motion of the wrist at 40%. (Ex. 25) At the request of the VA, Colonel Caldwell, MC, USA, examined Petitioner on November 22, 1950. He found that his "functional (masticatory efficiency) disability is 100% without the aid of his occlusal guide plane. With it he gains but little benefit. His facial asymmentry and disfigurement may be evaluated in approximately the same manner." (Ex. 26) All of the Naval Medical Staffs were silent as to any explanation why Petitioner was required to wear a silver splint in the mouth for 5 years when Colonel Caldwell stated that such an appliance is "a treatment appliance and is not intended for use over more than

6 months to 1 year period." Some person should have told the Navy Medical Staff that again the VA came to Petitioner's rescue, as it did in the matter of the X-ray of the skull, and provided him with a prosthesis in his mouth made of molybdenum. A Captain MacMillan, Medical Officer, Air Force, examined Petitioner at Bolling Field Hospital on March 19, 1949, and said of him: (Ex. 22, p. 2)

> "Slimly built WO (weather officer), completely coop., *understating his complaints.*" (Italics in text)

Dr. Pugh, Dr. Reitz and BCNR should have seen this one.

Petitioner's case below was decided upon Defendant's motion for Summary Judgment, Plaintiff having filed only opposition to it rather than a Cross Motion for Summary Judgment. Plaintiff's opposition contained no evidence to support it. Petitioner's Motion for Rehearing had the 35 Exhibits, which are filed herein, in support of the Motion, the Reitz secret advisory opinion being "newly discovered evidence", and the other Exhibits supporting the contention that it was a "mistake" or "inadvertence" under Rule 54(b) to have omitted all this documentary evidence.

The Court of Claims erred in overruling Petitioner's Motion for Rehearing. Such action was in conflict with the decision of the Court in *Proper* v. *United States*, 139 C. Cls. 511.

REASONS FOR GRANTING THE WRIT

This case presents highly important questions in the administration of justice as it affects the denial of rights to retirement benefits, chiefly to Reserve officers upon their release from active duty, as determined before *civilian Boards* for correction of errors or removal of injustices as have been established in the four Armed Services under the provisions of Section 207(a) of the Legislative Reorganization Act of 1946, as amended.

Petitioner's right to correct his record to show that he was retired for physical disability on October 17, 1946, was before the Secretary of the Navy, acting through his Board for the Correction of Naval Records, pursuant to Section 207(a) of the Legislative Reorganization Act of 1946, as amended. Section 207(a) provides in part:

> "The Secretaries of the Army, Navy, and the Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, *and acting through boards of civilian officers, or employees* * * * are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice * * *." (Italics supplied)

While Section 207(a) authorized the Secretaries of the various Armed Services to do the acts specified therein, "correct an error or remove an injustice," these could only be done by the Secretary concerned, "acting through boards of *civilian officers, or employees* of their respective Departments." (Italics supplied) Clearly, this clear and concise language ruled out other types of personnel and the use of the descriptive language of "civilian officers or employees" was a mandate to the military personnel that they shall exercise no "*jurisdiction*" over matters coming before BCNR. More significantly, they shall have no "*authority* to determine the merits of each case." Both the "jurisdiction" and the "authority to determine" was "reserved" to such Boards. (Italics supplied) Such admonitions are confirmed in the legislative history of section 207(a). The House Report 449, 82nd Congress, 1st session, p. 3, provides:

> "The Committee takes the position that the Congress having established Boards for the Correction of Military Records within each of the service departments, *the jurisdiction of such Boards as well as the authority to determine the merits of each particular case should*

be reserved to such Boards, to the exclusion of the Comptroller General." (Italics supplied)

Petitioner contends that the Secretary of the Navy, acting through his BCNR, could not validly, under section 207(a), refer the only issue in his case, namely, his physical incapacity for active duty to officers of the Naval Medical Corps for written advisory opinions. Even if the Secretary could obtain such advisory opinions from officers of the Naval Medical Corps, then he could not do so in the manner in which he did so, that is, obtain two secret advisory opinions from the Naval Medical Officers, one of which was furnished BCNR on February 24, 1954 which was 52 days after the Hearing before BCNR on December 21, 1953. (The decision of the BCNR was dated April 8, 1954.) As emphasized heretofore, *supra*, p. 8, the existence of this advisory opinion did not come to light until April 30, 1954, which was the one of Dr. Reitz, who was the same person who was disqualified from sitting on the BCNR at the Hearing. This feature of the administrative proceeding below, when viewed particularly in the light of the text of these secret advisory opinions may be appropriately described as "administrative lawlessness," *Peters* v. *Hobby*, 349 U. S. 331, 345.

The jurisdiction of the Court below to hear and determine an officer's claim for disability retired pay, such as here presented under Section 207(a), was invoked in *Proper* v. *United States*, 139 C. Cls. 511. Defendant below did not seek certiorari. The question presented in the *Proper* case, *supra*, was in a different form than presented herein. Proper's incapacity for active duty had been *approved* by the Army Board for correction of records. Before it reached the Secretary of the Army for approval, Brigadier General E. C. McNeil, USA (Ret.) Special Assistant, Office Secretary of the Army, addressed a memorandum to the Assistant Secretary recommending denial of relief to Proper since he did not become incapacitated

until after he left the service in 1953. The Secretary adopted the recommendation. However, in the instant case, all 3 advisory opinions, two of them secret, went to BCNR for their consideration rather than going *to the Secretary after the BCNR decision.* (Italics supplied) The Court below reversed. However, the Court, in giving the one and only reason for Congress removing the military from participation in these matters, which brings out in the open the protection of fundamental rights particularly of Reserve officers, stated:

> "Since the errors or injustices which might require correction *were originally made by the military,* Congress made it manifest that the correction of those errors and injuries was to be *in the hands of civilians.*" (Italics supplied)

These secret advisory opinions rendered by military officers circumvented Section 207(a) and constituted a technique for proof of Petitioner's disability which is procedurally indefensible. As this Court said in *Jay* v. *Boyd,* 351 U. S. 345, 358, "• • • where there is no compelling reason to refuse to disclose the basis of a denial of an application [for the suspension of deportation], the statute does not contemplate arbitrary secrecy." Here no statutory interpretation of Section 207(a) could have supported the "arbitrary secrecy" of these two secret advisory opinions. In *Morgan* v. *United States,* 304 U. S. 1, 22, the Secretary of Agriculture accepted and made as his own the findings which had been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceedings to know the claims thus presented and to contest them. But this Court considered that such procedure "is more than an irregularity; it is a vital defect." Here BCNR accepted the advisory opinions and adopted the conclusions reached in each of them as its decisions of April 8, 1954, and like the instant case, the findings were kept away from the respondents. The Court

in speaking of the duties the multiplying agencies owe in our complex society stated that "they must accredit themselves by acting in accordance with cherished judicial traditions embodying the basic concepts of fair play." It was not enough that the advisory opinions were secret. Each one of the two secret advisory opinions ignored Petitioner's skull fracture and medical reports which clearly showed him to be incapacitated for active duty. There was not a whit of evidence of "fair play" in either of the two secret advisory opinions. This Court recited in great detail the essential safeguards required to assure a party of a fair trial in which his rights can be asserted or defended. *Interstate Commerce Commission* v. *Louisville & Nashville RR*, 227 U. S. 88, 93. First, all the parties must be fully apprised of the evidence submitted or to be considered. An opportunity must be given to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain his rights to make its defense. All of these accepted safeguards were lacking in the matter of these secret advisory opinions, and such were highly prejudicial to Petitioner. *St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38, 73; *United States* v. *Abilene and So. Ry. Co.*, 265 U. S. 274, 298. On the administrative proceedings below the Hearing was neither a "fair" nor an "open" one, these being "rudiments of fair play assured to every litigant by the Federal Constitution *as minimal requirements*". (Italics supplied) *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393; *Joint Anti Fascist Committee* v. *McGrath*, 341 U. S. 123, 136, 168-170; *Den ex dem Murray* v. *Hoboken Land and Improvement Co.*, 18 How 272, 280-281. Again, as here, "information [was] secretly collected and never yet disclosed," and this was done, "without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted." This was the ground for refunding previously collected rates. The

Court stated: "This is not the fair hearing essential to due process." *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 300-301; *Gonzales* v. *United States*, 348 U. S. 407, 413; *Bridges* v. *Wixon*, 326 U. S. 135, 154; *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 427.

When a small part of the record of BCNR is examined, no doubt can reasonably exist but that the Reitz secret advisory opinion was substituted for the decision of BCNR on Petitioner's skull fracture or it seriously influenced BCNR in the decision it reached. On February 11, 1954, BCNR requested Bureau of Medicine and Surgery to furnish an explanatory memorandum "upon the oral testimony of Dr. Fuchs." It then admitted that such memo "will assist the Board in evaluating the medical evidence presented" (*supra*, p. 7), which the BCNR implies it must have in order to reach a decision. This appears clear when BCNR urges that the memo "be furnished as soon as possible" so that "final action may be expedited." This makes a "mockery of the law," as the Court below said in *Elchibegoff* v. *United States*, 106 C. Cls. 541, 550.

Petitioner's Medical Record

It is submitted that Petitioner's medical record and its consideration by those who examined him while on active duty is a vital part of Petitioner's cause at all of the administrative levels. Moreover, those *medical officers* and administrative officials who were called upon to examine those medical records after his release from active duty did so in a highly arbitrary and capricious manner, even to the extent of both ignoring a fracture of the skull and offering no reason for Naval Medical Staffs' failure to X-ray Petitioner's skull. It presents a typical pattern about which grave complaints were made in the Congress in 1951 and later in the Court of Claims. Nothing has been done to remedy it, at least from 1951 to 1957-1958.

Soon after the outbreak of the Korean War, Mr. Mahon was the Chairman of the Subcommittee of the House Appropriations Committee in the 81st Congress, 2nd Suppl. Approp. Bill 1951, Department of the Navy, and had before the Committee General Cates, then Commandant of the Marine Corps. The specific topic which came up was under the heading, "Reserves called with Disability Ratings." Mr. Scriviner made the following statement to General Cates as to all the Reserve Components: (p. 133)

> "Mr. Scrivner: And the kicking around that they have received has done more to break down any possible Reserve organization after this, is over than anything else under the sun. I should like to have you come up and read some of my mail, General."

Mr. Mahon then took up the matter of physical examinations given the Reserves. (p. 135)

> "General Cates: They are not ordered to active duty unless they can pass the physical examination. They must have the required physical ability. Of course, there is always a chance that a man's condition has improved since he was classified as 30-percent disabled."
>
> "Mr. Mahon: That is right, of course. That is possible. But I have heard it said that some of these men are examined by just walking through a room. It is said that there is no real physical examination. Men who have actually had the experience say that they are not examined. The Commandant of the Marine Corps should take all proper steps to see that they actually are. I realize that we are all prone to exaggeration at times, but I have heard this said so often that I have thought there must be some grain of truth in it."

The Court of Claims in the brief period from July 12, 1957, to October 8, 1958 denounced the medical examinations which had been given to three officers. In the *Prosser* case, *supra*, a very sad case comparable in another medical

area with the *Egan* case, *infra*, the Court with reference to the medical examinations said they "were hardly complete" (522) and they "were *not* thorough", (Italics by the Court) (527). Later, in *Brown* v. *United States*, No. 50362, decided October 8, 1958, the Court found that a physical examination given plaintiff, "was superficial in the extreme." C. Cls. (p. 8) In the meantime, the Court decided the case of *Egan* v. *United States*, No. 50031, decided January 15, 1958, C. Cls , 158 F. Supp. 337. Counsel here appeared for Mr. Egan. The Court referred to this case as a "case of mistaken identity and almost incredible negligence" (378), since the medical records of "*another* (Italics by the Court) John J. Egan," (381) who was insane, had been confused with the medical records of plaintiff, John J. Egan, with the result that Plaintiff Egan was confined for 5 months in various hospitals as an insane person. (380) After the discovery of this horrible mistake, Counsel sought Egan's pay as a Captain in the Marine Corps in this same BCNR. It was denied. The Court of Claims in awarding judgment found that BCNR and the Secretary of the Navy had acted "arbitrarily and illegally." (391) However, the Court found in an elaborate opinion by Judge Littleton that the true facts "could and should have been easily ascertained *by the medical* and administrative officials," and further stated: "We conclude that a more unjust and outrageous record against plaintiff could not have been compiled." (382) (Italics supplied) In the Hearing before the Naval Retiring Review Board (Marines), a Member inquired of Petitioner as to whether it was in his record that Air Force would not let him fly alone, as he had stated. Petitioner stated that, "I do not know," but added: (Ex. 5, p. 10)

> "Actually, most examinations were *given by Corpsmen.*" (Italics supplied)

In *Rex* v. *Justices of Bodmin* (1947), 1 K. B. 321, 325, a witness in a criminal case had been interrogated by the

Court in the absence of the defendant. Lord Chief Justice Goddard said:

> "It may be that they sent for this officer in the interest of the accused; it may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this Court has said that justice must not only be done but manifestly be seen to be done."

Petitioner respectfully submits that upon the showing made here, the case is of such nature as should call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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15th and H Streets, N. W.,
Washington 5, D. C.

Attorney for Petitioner

APPENDIX A

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the Land or Naval Forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 34 U. S. C. 855 (c) (1), provided in its material part, (2) that Petitioner:

> "shall be deemed to have been in the active naval service during such period, and they or their beneficiaries shall be in all respects entitled to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay and allowances as are now or may hereafter be provided by law or regulation for officers, warrant officers, nurses, and enlisted men of corresponding grades and length of service of the Regular Navy or Marine Corps: . . ."

34 U. S. C. 417, provides as follows:

> "When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the Secretary of the Navy, be retired from active service with

retired pay." (RS § 1453). As amended June 17, 1948, c. 497, § 1 (b), 62 Stat. 477.

Section 207 of the Legislative Reorganization Act of 1946, as amended by the Act of October 25, 1951. 65 Stat. 655, 5 U. S. C. 191a, provides in part, as follows:

(a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers, or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 1-55

(Decided December 4, 1957)

JOHN M. KEARNEY

v.

THE UNITED STATES

Mr. Robert T. S. Colby, for the plaintiff. *Mr. Dale Jernberg* was on the brief.

Mr. John R. Franklin, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues for retired pay as a former officer of the Marine Corps. The Government moves for a summary judgment on the ground that there is no genuine issue as to any material fact and that, as a matter of law, the plaintiff is not entitled to judgment.

The plaintiff enlisted in the Naval Reserve in September 1942. After a prescribed course as an aviation cadet the plaintiff was, on February 18, 1944, commissioned as a second lieutenant in the Marine Corps. He was later promoted to first lieutenant. In June 1945 he was injured, in line of duty, in an airplane accident. He recovered and resumed full flying status. On October 17, 1946, he was honorably released to inactive duty, "not by reason of physical disability."

About September 29, 1948, the plaintiff applied to the United States Air Force for a commission. He had, from the time of his release from the Marine Corps to inactive duty in 1946, maintained his status in the Marine Corps Reserves. On November 7, 1948, he resigned from the Marine Corps and on November 8 entered on active duty as a captain in the United States Air Force. In connection with his application to the Air Force, he was given a medical examination in October 1948, which disclosed no physical defects.

On November 22, 1948, plaintiff was examined by a flight surgeon and another medical officer, who determined that he was physically qualified for flying duty, and required no corrective measures or other action. Plaintiff continued on active duty with the Air Force until July, 1950 when he was released to inactive duty. A medical examination at the time of that release found him "qualified for General Duty."

Effective January 18, 1952, the Veterans' Administration awarded the plaintiff a 70 percent disability rating for

service-incurred disabilities. In 1952 he applied to the Board for Correction of Naval Records for disability retirement from the Marine Corps, based upon his 1945 injuries. The Correction Board seems to have referred the case to a Naval Retiring Review Board which considered the case and reported to the Correction Board, which then found that the plaintiff was not entitled to relief. The Board's decision was approved by the Secretary of the Navy in 1954.

The plaintiff's claim is that in the airplane crash in June 1945, he was incapacitated for active service, with several severe permanent disabilities. He alleges that the Correction Board and the Secretary acted "arbitrarily, capriciously, contrary to the evidence, and without force of law."

The Government has submitted various records which show that the Correction Board's proceedings included a hearing at which the plaintiff was present and was represented by counsel and presented a medical witness. The Board had before it the results of the numerous medical examinations which the plaintiff had undergone both in the Marine Corps and in the Air Force. It found that he had some disability, but that he was, at the time of his release from active duty in the Marine Corps, qualified for military service, and that he had thereafter performed such service in the Air Force.

The Correction Board and the Secretary did not act arbitrarily, capriciously, contrary to law, or without supporting evidence. Indeed, except for the contrary conclusion of the Veterans' Administration, the evidence would seem to have been quite conclusive that the plaintiff was not incapacitated for military service. The Veterans' Administration thought otherwise in 1952. The Correction Board was not under a duty to defer to the conclusion of the Veterans' Administration if the evidence persuaded it to the contrary.

We think the decision of the Correction Board, approved by the Secretary, that the plaintiff was physically qualified

to perform military duties at the time of his release to inactive duty on October 17, 1946, was not arbitrary, capricious or otherwise illegal and should not be disturbed. *Rafael San Milan, Jr.* v. *United States*, No. 182-54, decided July 12, 1957.

The defendant's motion for summary judgment is granted and the plaintiff's petition is dismissed.

It is so ordered.

FAHY, *Circuit Judge*, sitting by designation; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

IN THE UNITED STATES COURT OF CLAIMS

1-55	JOHN M. KEARNEY	v. THE UNITED STATES
161-57	AMERICAN SANITARY RAG COMPANY	
500-57	CATALINA PROPERTIES, INC.	
576-57	FRED LEINER	

Order

These cases come before the Court on motions for rehearings, amendments of judgments or new trials under Rules 53 and 54 of the Rules of this Court, and on consideration thereof,

IT IS ORDERED this eleventh day of February, 1959, that said motions be and the same are overruled as follows:

1-55	John M. Kearney.	Plaintiff's Motion
161-57	American Sanitary Rag Company.	Plaintiff's Motion.
500-57	Catalina Properties, Inc.	Plaintiff's Motion.
576-57	Fred Leiner.	Defendant's Motion.

BY THE COURT

/s/ MARVIN JONES,
Chief Judge.

FILE COPY

JUN 5
JAMES R. BROWNING

No. 899

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN M. KEARNEY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rule involved	3
Statement	2
Argument	7
Conclusion	14
Appendix	15

CITATIONS

Cases:

Barker v. *United States*, No. 471, October Term, 1956 14

Benton v. *Vinson, Elkins, Weems & Searls*, 255 F. 2d 299, certiorari denied, 358 U.S. 885 9

Holliday v. *United States*, 128 Ct. Cl. 647 11

Johnson, Rita Smithson v. *United States*, 158 Ct. Cl. 81 11

Kendall v. *United States*, 107 U.S. 123 14

Labor Board v. *Mackay Co.*, 304 U.S. 333 13

Lemly v. *United States*, 134 Ct. Cl. 365 11

Perrin v. *Aluminum Co. of America*, 197 F. 2d 254 8

Proper v. *United States*, 139 Ct. Cl. 511 14

Raughley v. *Pennsylvania Railroad Co.*, 230 F. 2d 387 8

Robertson v. *Chambers*, 341 U.S. 37 13

Rutland Transit Co. v. *Chicago Tunnel Terminal Co.*, 233 F. 2d 655 8, 9

Saenz v. *Kenedy*, 178 F. 2d 417 8

San Millan v. *United States*, 139 Ct. Cl. 485 11, 14

Smith v. *Kincaid*, 249 F. 2d 243 8

Soriano v. *United States*, 352 U.S. 270 14

Tarkington v. *United States Lines Co.*, 222 F. 2d 358 8

United States v. *Suter*, No. 620, October Term, 1957 10

Wales v. *United States*, 130 F. Supp. 900 12

508695—59——1

Statutes:

	Page
Career Compensation Act of 1949, Sec. 402, 63 Stat. 816, 37 U.S.C. (1952 ed.) 272	5
Legislative Reorganization Act of 1946, Sec. 207, 60 Stat. 837, as amended, 65 Stat. 655, 5 U.S.C. 191a, now codified as 1[illegible] U.S.C. Supp. IV) 1552	10, 16–17
Naval Aviation Personnel Act of 1940, Sec. 4, 54 Stat. 864, as amended, 34 U.S.C. 855c–1	16
28 U.S.C. 2101(c)	7
28 U.S.C. (Supp. IV) 2501	2, 14, 17
34 U.S.C. 417	11, 16

Miscellaneous:

32 C.F.R. § 723.6(2)	12–13
Federal Rules of Civil Procedure, Rule 60(b)	8
Rules of the Court of Claims:	
Rule 53	7, 8
Rule 54	7
Rule 54(b)	1, 2, 8, 12, 15

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 899

JOHN M. KEARNEY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Claims (R. 13; Pet. App. B, p. 2a) is reported at 156 F. Supp. 928. The order of the Court of Claims overruling petitioner's motion for relief from judgment under Rule 54(b) (R. 27) is printed in Appendix B of petitioner's brief.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1957. Petitioner's "Motion for Rehearing under Rule 54(b)" of the Court of Claims was filed on December 3, 1958. The order overruling petitioner's motion was entered February 11, 1959. The petition for a writ of certiorari was filed on May

8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the right to seek review in this Court of a final judgment of the Court of Claims is restored by a motion for relief from judgment under Rule 54(b) of the rules of that court filed approximately one year after the entry of final judgment.

2. Whether the Court of Claims has jurisdiction to review a determination by a military department that an officer was not incapacitated at the time of his release from active duty.

3. Whether, if such jurisdiction exists, the Secretary of the Navy, acting through the Board for the Correction of Naval Records, acted arbitrarily, capriciously, and contrary to law and due process in determining that petitioner was physically fit to perform military duties at the time of his release from active military duty.

4. Whether a claim for disability retirement pay accrues at the time of release from active duty and becomes barred by the statute of limitations (28 U.S.C. (Supp. IV) 2501) six years thereafter.

STATUTES AND RULES INVOLVED

The pertinent statutes and rule are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

Petitioner, a former officer in the Marine Corps, brought this suit to recover disability pay allegedly due him.

Petitioner enlisted in the United States Naval Reserve on September 2, 1942, and, on February 18, 1944, was commissioned a second lieutenant in the United States Marine Corps Reserve. On June 13, 1945, petitioner was injured, in the line of duty, in an airplane accident. Navy doctors diagnosed his injuries as a fracture of the right mandible (jaw), a dislocation of the right wrist, and contusions, lacerations, and abrasions (A, Ex. 15).[1] After hospitalization and a temporary return to duty, a Board of Medical Survey, on December 27, 1945, found that the injury to petitioner's jaw rendered him unfit for full duty, but that his condition would respond favorably to further treatment (A, Ex. 15). Petitioner, after receiving treatment at a special clinic, faced a Board of Medical Survey, again, on May 15, 1946. The Board, finding that a prosthetic device given him at the clinic had greatly improved his condition and that he had fully regained sensation in his face and neck, rendered its opinion that petitioner was fit for duty (A, Ex. 30, pp. 3–4). On May 22, 1946, a physical examination found petitioner acceptable for flying status (A, Ex. 30, p. 4). On October 17, 1946, petitioner, then a first lieutenant, was honorably released to inactive duty "not by reason of physical disability."[2]

In 1948, petitioner applied for a reserve commis-

[1] "A" refers to the 20 exhibits filed by petitioner which accompany the Record. "B" refers to the 4 exhibits filed by respondent which accompany the Record.

[2] In the year preceding his release from the Marine Corps, petitioner had 700 hours of flying time (A, Ex. 18).

sion in the United States Air Force. In connection with his application for this Air Force appointment, he was given a medical examination on October 18, 1948, by a Navy doctor at the flight surgeon's office at the Naval Air Station, Anacostia, and was found physically fit for general service (B, Ex. 1). Petitioner, having resigned his reserve commission in the Marine Corps, was commissioned a captain in the Air Force and, soon thereafter, was called to active duty. On November 22, 1948, petitioner was examined by a flight surgeon and another medical officer, and was found physically qualified for flying duty (B, Ex. 2). In his subsequent tour of duty with the Air Force, he held an office position, but received flight pay, as well, for going on flight assignments (A, Ex. 7, p. 65; A, Ex. 30, p. 13). Petitioner was released to inactive duty in July, 1950. He received another medical examination at this time, and was found, at the time of his separation from the Air Force, physically qualified for general duty (B, Ex. 3).

The Veterans' Administration awarded petitioner a 70 percent disability rating for service incurred disabilities, effective January 18, 1952, and a disability rating of 50 percent retroactive to October 1, 1948 (A, Ex. 32). The Veterans' Administration award referred to petitioner's jaw injury, his wrist injury, and also diagnosed him to have had a fracture of the left parietal region of the skull (A, Ex. 30, p. 19).

In 1952, petitioner applied to the Board for Correction of Naval Records, requesting that his record be amended to state that he had been physically disabled at the time of his release from the Marine Corps

on October 17, 1946, and that he be granted disability retirement benefits. The Correction Board wrote the Physical Disability Appeal Board (Marine Corps) asking it to review petitioner's case. The latter board replied that, since petitioner was released from active duty prior to the passage of the Career Compensation Act of 1949, 63 Stat. 816 (37 U.S.C. (1952 ed.) 272), the proper reviewing agency, under applicable Navy directives, was the Naval Retiring Review Board (Marine Corps) (A, Ex. 4). On August 28, 1953, petitioner, appearing with counsel, presented his case at a hearing before the Naval Retiring Review Board (Marine Corps). The Board rejected petitioner's claim, holding unanimously that petitioner had been fit for duty at the time of his release from active duty with the Marine Corps (A, Ex. 5, p. 14). On December 21, 1953, petitioner, again represented by counsel of his own choice, appeared before the Correction Board and received another full hearing, in which both he and Dr. Marvin Fuchs, a medical witness called by him, testified and answered questions posed by the Board (A, Ex. 7).[2] The Correction Board, consisting of three civilian members, ruled that no modification of petitioner's naval record was warranted (B, Ex. 4). The Board's decision was based on its evaluation of petitioner's many medical records, the testimony of petitioner and Dr. Fuchs,

[2] At this hearing, the Board sought to have Commander Harvey Reitz, a Navy doctor, present to assist it. When petitioner's counsel objected to Dr. Reitz's participating, the Board, without passing on the validity of the objection, asked Dr. Reitz to absent himself and the hearing proceeded (A, Ex. 7, pp. 3–4).

the findings of the Naval Retiring Review Board, an opinion from the Bureau of Medicine and Surgery analyzing the medical evidence, and applicable statutes and regulations (B, Ex. 4). It found that the injuries sustained by petitioner in the 1945 accident were:

> * * * a fractured mandible which resulted in malocclusion, contusions to the left side of the head, and carpo-metacarpal dislocation (right wrist) (B, Ex. 4, p. 3).

The Board's report to the Secretary of the Navy pointed out that, despite petitioner's claims that he had been suffering frequent incapacitating headaches since 1945, the numerous physical examinations petitioner had received since the accident had found him physically qualified for duty involving the actual control of aircraft (B, Ex. 4, p. 3). In fact, the physical examination preceding his separation from the Air Force contained explicit denials by petitioner that he had any complaints relative to headaches or migraine (B, Ex. 4, p. 3). The Board concluded that the evidence presented did not establish that petitioner, on October 17, 1946, had such defects as would incapacitate him from performing the duties of his rank (B, Ex. 4, p. 3). In 1954, the Secretary of the Navy approved the Board's decision.

On January 3, 1955, petitioner brought suit in the Court of Claims, alleging that the Correction Board and the Secretary had acted "arbitrarily, capriciously, contrary to the evidence, and without force of law", and demanding retirement pay from October 17, 1946. The Government filed a motion for summary judgment on three alternative grounds, outlined in this

brief. *Infra*, pp. 9–14. The Court of Claims, on December 4, 1957, granted the motion on the ground that the decision of the Correction Board was not arbitrary, capricious or otherwise illegal, and entered judgment in favor of the United States. Almost one year later, on December 3, 1958, petitioner, represented by a new counsel, filed in the Court of Claims what he labeled a "Motion for Rehearing under Rule 54(b)" (R. 17). The grounds for the motion were the "mistake" of petitioner's former counsel in not introducing into the proceeding the 35 exhibits on which petitioner presently relies, and "newly discovered evidence" (R. 17). Petitioner's motion was overruled summarily by the Court of Claims on February 11, 1959. Petitioner filed this petition for certiorari on May 8, 1959.

ARGUMENT

1. Petitioner, in asking this Court to consider the same contentions which the Court of Claims decided against him on December 4, 1957, is clearly attempting to circumvent the statutory requirement (28 U.S.C. 2101(c)) that a petition for certiorari be filed within 90 days after entry of the judgment sought to be reviewed. To avoid this barrier, petitioner relies on the fact that a motion, filed by him under Rule 54(b) of the Rules of the Court of Claims (Appendix, *infra*, pp. 15–16), was overruled on February 11, 1959, less than 90 days before he filed his petition for certiorari.[4]

[4] The order of the Court of Claims, overruling petitioner's motion, was applicable, by its terms, to motions made under Rules 53 and 54 by litigants in four different lawsuits (R. 27)

Although Rule 54(b) provides flexible time limits for the filing of motions, it also provides that motions made under it do *not affect the finality of a judgment or suspend its operation.* That this limitation prevents any such motion from tolling the time limitations for seeking review is made eminently clear by the decisions interpreting comparable Rule 60(b) of the Federal Rules of Civil Procedure, which has the substantially identical language. *Raughley* v. *Pennsylvania Railroad Co.*, 230 F. 2d 387 (C.A. 3); *Saenz* v. *Kenedy*, 178 F. 2d 417 (C.A. 5); *Tarkington* v. *United States Lines Co.*, 222 F. 2d 358 (C.A. 2). *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254 (C.A. 9).

Thus, review of the original judgment is barred, and the petition is timely only as to the single question of whether the Court of Claims committed an abuse of discretion in refusing to vacate its original judgment.[5] *Saenz* v. *Kenedy, supra; Smith* v. *Kincaid*, 249 F. 2d 243 (C.A. 6); *Tarkington* v. *United States Lines Co., supra; Rutland Transit Co.* v. *Chicago Tunnel Terminal Co.*, 233 F. 2d 655 (C.A. 7). In view of the grounds which petitioner urged in support of his motion, this contention is obviously untenable. Petitioner's motion sought to reopen the proceeding on the basis of evidence which was neither new, newly

(Pet. App. B, p. 5a). The motion made by petitioner in the instant case was clearly one under Rule 54(b) since reference to that rule was made on the face of the motion. In fact, petitioner's motion could not have been made under Rule 53, which requires the filing of motions within 30 days after the entry of judgment, since it was not filed with the Court of Claims until almost a year after judgment had been entered.

[5] A contention which the petition does not raise.

discovered, nor omitted from the prior proceeding by excusable neglect. The only justification advanced for the earlier failure to introduce the 35 exhibits is that petitioner's former counsel was mistaken as to the proper course to pursue in presenting petitioner's case (A, Ex. 2), a justification which, in the absence of a convincing explanation for the lack of diligence, is not contemplated by the rule. *Rutland Transit Co.* v. *Chicago Tunnel Terminal Co., supra; Benton* v. *Vinson, Elkins, Weems & Searls,* 255 F. 2d 299 (C.A. 2), certiorari denied, 358 U.S. 885. In any case, a review of the Court of Claims' accurate recital of the facts and succinct evaluation of the evidence discloses that the court was fully aware of the relevant facts when it granted the motion for summary judgment (Pet. App. B, p. 2a). As "newly discovered evidence" of the Correction Board's unlawful actions petitioner makes reference to a letter which his former counsel had found in the files of the Board three years before the Court of Claims' decision (A, Ex. 2). This allegedly sinister document is nothing more than a letter from the Bureau of Medicine and Surgery to the Correction Board, analyzing the medical evidence in the case (A, Ex. 9).

Since the Court of Claims did not commit an abuse of discretion in refusing to alter its decision on the basis of the grounds presented in the motion, this petition should be denied without consideration of the argument therein.

2. We have previously urged in the Court of Claims, and in a prior petition for certiorari in this

Court, that the decision as to whether military personnel have been properly retired for physical disability is a matter entrusted by Congress to the armed services under proceedures established by statute and is not subject to review in the courts. See petition for a writ of certiorari in *United States* v. *Suter*, No. 620, October Term, 1957. The Court of Claims has not accepted this view and does not do so in this case. In the event that certiorari should be granted here, the Government would seek to support its action in this case, as it did in the court below, on the ground that the determination as to the officer's physical ability to perform his military duties is not reviewable in the courts. We do not argue the point further since we believe the Court should deny certiorari for the other reasons herein set forth.

3. Even if the court below had jurisdiction over the issue, the records presented by both parties as exhibits clearly indicate that petitioner's claims that the Board for the Correction of Military Records* acted arbitrarily and violated his constitutional rights are ill-founded. As the court below pointed out (Pet. App. B, p. 4a), the evidence in this case is overwhelmingly in favor of the Board's finding. In fact, the petitioner has himself denied the existence of continuing injury; when he sought a military appointment or flight duty, with its attendant flight pay, his medical history listed "no defects", "no present complaints", and "no prosthetic appliances" (B, Ex. 1, 2).

*The Board was established pursuant to Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837 (5 U.S.C. 191a) (Appendix, *infra*, pp. 16–17), now codified as 10 U.S.C. (Supp. IV) 1552.

These medical records, in conjunction with petitioner's activities in the Air Force, strongly support the Board's findings. The contrary determination of the Veterans' Administration, administering a different law, was in no way binding on the Board.[1] *Rhea Smithson Johnson* v. *United States*, 138 Ct. Cl. 81; *Holliday* v. *United States*, 128 Ct. Cl. 647. Petitioner, seeking to establish that the Navy did not properly examine his physical condition, alleges repeatedly that the Navy took no X-rays of his skull. His reliance on this accusation is inconsistent with other assertions made by both himself (A, Ex. 7, pp. 53–54) and his medical witness (A, Ex. 7, p. 20) that X-rays would not be useful in revealing the injury to his brain. In any event, it seems that the Board had before it the record of an X-ray of petitioner's skull performed by the Air Force on January 9, 1950 and that this X-ray revealed no abnormalities (A, Ex. 7, p. 53). Dr. Fuchs, petitioner's medical witness at the hearing before the Board, had only been treating petitioner since 1951 and, admittedly, could give no opinion as to petitioner's fitness for duty on October 17, 1946. As he stated (A, Ex. 7, at p. 21):

> Dr. FUCHS. * * * I have given no opinion as to whether he was in 1948 fit for military service.
>
> Mr. PONS. Or 1945 or 1946?
>
> Dr. FUCHS. Or 1945 or 1946.

[1] 34 U.S.C. 417 (Appendix, *infra*, p. 16) requires that the officer be incapacitated at the time of release from active service and the incapacity must be of such character as to disqualify the officer absolutely for duty. *Lemly* v. *United States*, 117 Ct. Cl. 365; *San Milian* v. *United States*, 139 Ct. Cl. 485.

On this record, the Board's determination can hardly be called arbitrary, capricious, or contrary to law. Petitioner, claiming that the Secretary of the Navy and the Correction Board adopted procedures violating due process,* relies on the holdings of this Court that, where an individual is entitled to a hearing, he must receive due notice, have an opportunity to be heard, and be confronted by the evidence against him. Yet, although the statute creating this Board does not require that a hearing be given (Appendix, *infra*, pp. 16–17), *Wales* v. *United States*, 130 F. Supp. 900 (Ct. Cl.), the undeniable fact is that petitioner received a hearing which covered 79 pages of transcript and in which he was represented by counsel and presented witnesses (A, Ex. 7). Petitioner's attack is largely directed at the fact that the Board considered an opinion of the Naval Retiring Review Board and two letter from the Bureau of Medicine and Surgery, which were not shown to petitioner at the time of the hearing. Significantly, he does not allege that this practice was not authorized by the departmental regulations establishing the Board. The statute specifically declares that the respective Secretaries shall prescribe the procedures to be used by the Correction Boards (Appendix, *infra*, p. 17). The regulations of the Department of the Navy establishing this Board provide (32 CFR § 723.6(2)):

> Whenever, during the course of its review of the case, it appears to the Board's satisfaction

* This contention was not raised in the Court of Claims, either in the complaint (R. 1) or in the motion under Rule 54(b) (R. 17).

> that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues.

Certainly, due process does not require that the Board should rule, in this nonadversary proceeding, on technical medical issues without the advice of impartial medical authorities. The letters complained of consisted of nothing more than evaluations by Navy doctors* of the medical evidence presented, which evaluations were considered by the civilian Board in conjunction with the other materials before it (B. Ex. 4, p. 2), cf. *Robertson* v. *Chambers*, 341 U.S. 37. In cases such as this, the Fifth Amendment guarantees no particular form of procedure and can be evoked only to protect substantial rights, *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 349–50. It is evident that the procedures, established by the Secretary of the Navy, pursuant to statute, in no way operated to infringe petitioner's substantial rights.

4. Since petitioner's claim is that he should have been awarded disability retirement pay from the date of his release from active duty, on October 17, 1946, the claim is barred by the six-year limitation in the

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*One of the letters was, apparently, prepared by the same Dr. Reitz whose assistance the Board had sought at petitioner's hearing, a fact on which petitioner, for some reason, lays great significance.

jurisdictional statute of the Court of Claims[10] (Appendix, *infra*, p. 17, 28 U.S.C. (Supp. IV) 2501). *Soriano* v. *United States*, 352 U.S. 270; *Kendall* v. *United States*, 107 U.S. 123.

CONCLUSION

This petition is untimely; the court below had no jurisdiction to adjudicate petitioner's claim, which was, in any event, barred by the statute of limitations; and the record clearly shows that petitioner's contentions have no substantial merit. The petition does not present questions warranting the Court's review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1959.

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[10] Although it did not reach the issue in the instant case, the Court of Claims has, in its more recent cases, held that the cause of action arises from the denial of relief by the Correction Board as approved by the secretary of the service involved. See, *e.g. Sam Millan* v. *United States*, 139 Ct. Cls. 485; *Proper* v. *United States*, 139 Ct. Cls. 511. See the Government's Brief in Opposition in *Barker* v. *United States*, No. 471, October Term, 1956.

APPENDIX

* * * * * *

Rule 54(b) of the *Rules of the United States Court of Claims* (rev. 1957) provides:

> Rule 54. Relief From Judgment or Order
>
> * * * * * *
>
> (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.:* On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The

relief provided by this rule shall be in addition to the relief available to the United States under Rule 53(a)(2).

* * * * * *

Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 34 U.S.C. 855c–1, reads in part:

All officers, nurses, warrant officers, and enlisted men of the United States Naval Reserve or United States Marine Corps Reserve, who—

(1) if called or ordered into active naval or military service by the Federal Government for extended naval or military service in excess of thirty days, suffer disability or death in line of duty from disease while so employed * * *

* * * * * *

shall be deemed to have been in the active naval service during such period, and they or their beneficiaries shall be in all respects entitled to receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits, and pay and allowances as are now or may hereafter be provided by law or regulation for officers, warrant officers, nurses, and enlisted men of corresponding grades and length of service of the Regular Navy or Marine Corps: * * *

34 U.S.C. 417 reads:

When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the Secretary of the Navy, be retired from active service with retired pay.

Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, as amended by the Act of October 25, 1951, 65 Stat. 655, 5 U.S.C. 191a, provided in pertinent part, as follows:

(a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud: * * *

* * * * * *

28 U.S.C. (Supp. IV) 2501 provides:

Time for filing suit.

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * * * * *

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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 899

JOHN M. KEARNEY, *Petitioner,*

v.

THE UNITED STATES, *Respondent*

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner's Reply Brief makes specific page references to Respondent's Brief in Opposition and, for the most part, such references are made in the order in which the contentions of Respondent appear in its brief.

Respondent's brief at p. 3, footnote (2) recites that Petitioner had 700 hours of flying time for the year preceding his release from active duty which occurred on October 15, 1946. We can offer no explanation as to the source of this information. Why it should appear in a report of a medical examination conducted on October 15, 1946 is unknown to us. This same examination is recited in part in Examiner Pons brief (Ex. 30, p. 5), yet no reference is made therein to this 700 hours of flying time.

As far as we know, it does not appear at any other place in the Hearing before the BCNR or in the record before the Court of Claims. Its appearance here is the first time Petitioner knew of it. Frankly, we don't see how it could be true. The year preceding his release from the Marine Corps would encompass the period from October 16, 1945, to October 17, 1946. Petitioner was in the hospital from June 13, 1945, being the date of the airplane crash, to April 15, 1946. He was on recuperative leave from April 15, 1946, to May 15, 1946. Thereafter, he was on active duty from May 15, 1946, to October 17, 1946, on which date his terminal leave expired. Thus, for the 5 month period, this gross flying time of 700 hours, would require him to fly 140 hours a month. It simply cannot be true. However, to qualify for flight pay when he was out of the hospital only required him to be in a plane with a pilot 4 hours a month. Petitioner testified before two Boards, under oath, that he did no solo flying after his plane crash on June 13, 1945.

Respondent's brief, beginning at the bottom of p. 5 and continuing, describes the evidence upon which BCNR based its decision, but the Respondent neglects to include therein the secret advisory opinion of Dr. Reitz and also fails to state that the "opinion" of Dr. Pugh was also a secret advisory opinion. Respondent then quotes the decision of BCNR as to the "injuries sustained" (top of p. 6) by Petitioner, which should be cited as (B, Ex. 4, p. 2, Par. 9b). Please compare such "injuries sustained" with Respondent's *own* Exhibit B3, being a report of a medical examination dated July 17, 1950, which was, in fact, the very examination "preceding his separation from the Air Force." It provides:

> "Dislocation wrist, right, fractured jaw, and *fractured skull.* Aircraft accident 1945 (USMC) 40% loss of motion, wrist, and *headache persist.* No other pertinent medical history." (Italics supplied)

Air Force did not see fit, as did the BCNR, to omit either the Petitioner's "fractured skull" or his "headaches" or attempt to minimize loss of motion of Petitioner's wrist.

Respondent's brief, in the last sentence commencing at the bottom of p. 8 and continuing on p. 9 to the end of the paragraph, is misleading. In the first place, Respondent earlier at p. 7 quite properly describes our position in the Court below as a "mistake" of Petitioner's former Counsel in not introducing the 35 exhibits and the "newly discovered evidence." Both of these are consistent with the provisions of Rule 54(b). However, it was not the secret advisory opinion itself of February 24, 1954 which was the "newly discovered evidence", but the fact that its author was Commander Harvey E. Reitz, Medical Corps, USN, who was the same person who had been, long prior to the above date of said opinion, disqualified from sitting on the BCNR at the Hearing on December 21, 1953. Respondent blandly describes this secret advisory opinion, coming to BCNR at the time it did, by this particularly objectionable author at "nothing more that a letter from the Bureau of Medicine and Surgery to the Correction Board, analyzing the medical evidence in the case." No reason is offered and none could exist, why Dr. Reitz and Dr. Pugh were not called to the witness stand and required to testify as did Dr. Fuchs. It is interesting to note that the BCNR and its Examiner Pons propounded 128 questions to Petitioner and Dr. Fuchs, 37 of them being propounded by Examiner Pons. In addition, BCNR obtained and considered 3 adverse medical advisory opinions from officer personnel of Navy, 2 of which were secret. Further, Examiner Pons filed a brief with BCNR of 24 pages. A casual examination of it will reveal definite and compelling evidence of strong opposition to Petitioner, yet Respondent here refers (p. 13) to the proceeding in BCNR as a "nonadversary proceeding." Respondent's brief in the middle of page 11 refers to an X-ray, "by the Air Force dated January 9, 1950.". First, we can find no

examination on such a date, but the citation to (A, Ex. 7, p. 53) gives the date of this examination as *June 9, 1950.* It was taken by Board Member Wilson from Examiner Pons brief. (A 30, p. 12) Petitioner's affidavit in support of his Motion for Rehearing below recites that such medical examination of June 9, 1950 was not in the medical records which he received from the Air Force. However, Petitioner's brief in support of his Motion below stated at page 32 as follows: "It is submitted that since Examiner Pons relied upon this examination and it purported to be against plaintiff, that the defendant should require BCNR to produce it." *It was ignored.* Again Respondent's brief at the top of p. 5 in speaking of the Physical Disability Appeal Board (Marine Corps) states that it, "*replied* [to BCNR] that—the proper reviewing agency, under applicable Navy directives, was the Naval Retiring Review Board (Marine Corps) (A, Ex. 4)". We can find no such "reply" in Ex. 4. This Ex. 4 brings to light that the directive of the Secretary of the Navy which permitted Boards to furnish "advisory opinions" in cases requested of them by the Correction Boards was dated "9 April 1953." (Ex. 4, Ref. (b)) This was about 9 months *after* the Petitioner filed his application in BCNR which was dated July 8, 1952. If, on the other hand, the power to issue the directive was founded upon Regulation 32 CFR § 723.6 (2), such was dated November 11, 1952, which was about 4 months *after* Petitioner filed his Application with BCNR. In these and other circumstances, the Secretary of the Navy was powerless to seek "advisory opinions" in the instant case from any source. The decision of BCNR based upon them should not be permitted to stand.

The recitations at the bottom of page 10 of Respondent's brief are incorrect. Petitioner neither signed the exhibits referred to nor did he give the information quoted. The sources of both recitations are unknown to him.

Respondent's brief near the bottom of page 11 presents a small excerpt of the testimony of Dr. Fuchs. We are satisfied that it should be treated here.

Respondent states, "*admittedly*, [Dr. Fuchs] *could give no opinion* as to Petitioner's fitness for duty on October 17, 1946." (Italics supplied) Dr. Fuchs then states, *in part*, (Italics supplied) as follows: " • • • I have given no opinion as to whether he was in 1948 fit for military service", and Dr. Fuchs added the years, "Or 1945 or 1946". We vigorously disagree with the interpretation placed upon this language by the Respondent. The word "admittedly" is incorrect in the context used. More significantly, Respondent takes the position that the words, "could give no opinion" are synonymous with the words, "I have given no opinion • • •." We think not. Respondent neglects to recite *all* of the material part of Dr. Fuchs' answer, giving only part of it as above indicated. Here is the complete response made by Dr. Fuchs.

> "Dr. Fuchs: Well, I believe the question as originally put to me was, 'Is he now fit for military service?' I said No. The second question that was asked me by your President or one of the other Members, 'Would he be able to operate a plane in the period 1945-1949?' *He could if he were not having the headaches at that particular moment.* I have given no opinion as to whether • • • ".

Earlier, the testimony of Dr. Fuchs revealed that Petitioner had severe headaches at the rate of 3 to 10 a month. (Ex. 7, p. 16) Then the following testimony appeared: (Ex. 7, p. 17)

> Mr. DeWald: Would there be, in your opinion, during that course of time that he was on active duty from 1945 until September of 1946 and from November of 1948 up until July of 1950, it would be your opinion, that he should not have been flying during that period of time, based upon what you have observed in this case? This is a difficult position I am putting you in. I am asking you for an opinion during the time you never saw him.
>
> Dr. Fuchs: I should say that if he had headaches to this degree he should not have been flying.

Mr. DeWald: Any questions, Mr. Wilson?

Mr. Wilson: Would you say, if he had had headaches during that period to that degree he could not have flown an airplane?

Dr. Fuchs: For a patient they are not predictable. If he should be fortunate as to operate a plane during the period of time that he was not incapacitated he would have no difficulty in operating it. But should he be incapacitated he would be under serious difficulty to continue to pilot a plane.

Mr. Barnes: Doctor, I believe you said it was your understanding the headaches have been present right from the beginning of the time of trauma, right on through?

Dr. Fuchs: Yes.

Later, Mr. Barnes again revived this subject and stated: (Ex. 7, p. 64)

Well, I think we pretty much established something to back up Dr. Fuchs' impression that these headaches have been rather continuous ever since the time of the crash. I don't mean continuous. I mean there's been a regular pattern of headaches.

Respondent in the middle of page 11 of its brief states that, "X-ray would not be useful in revealing the injury to the brain." Respondent has confused "injury to the brain" with "scar tissues of the brain."

Mr. Pons: Do you know whether he has scar tissues of the brain?

Mr. DeWald: This is something that would be disclosed by X-rays?

Dr. Fuchs: No, or other specialized techniques we have.

It seems astonishing that a substantial part of the Hearing was devoted to Petitioner's fractured skull and the serious consequences resulting from this injury, yet the BCNR refers to the fracture only as, "or headaches." It didn't

bother to tell us what caused them. As to the headaches, BCNR found a regular pattern of them since the time of the airplane crash. This conclusion is in such serious conflict with the Pugh secret advisory opinion of November 6, 1953 (Ex. 6), as might lead one to conclude that these authorities were talking about two different patients. Either Petitioner was incapacitated or, if not, that Naval Medical staffs must, as prophets, tell him in advance that he is going to have a serious headache, so don't fly a plane today, but you may fly one tomorrow. If Naval Medical Staffs could have shown that he was pilot of a plane *with a cadet in it*, on a training flight at any time after the airplane crash, we are satisfied they would have done so. (Italics supplied)

Respondent's brief pp. 12-13 states that the petitioner "does not allege that this practice was not authorized by the departmental regulations establishing the Board," the reference to practice being the fact that BCNR considered "An opinion of the Naval Retiring Review Board and two letters from the Bureau of Medicine and Surgery," such two letters being the secret Advisory Opinions of Dr. Pugh and Dr. Reitz. Respondent then quotes a regulation of Title 32 CFR § 723.6(2). Clearly, Petitioner was under no duty to show that departmental regulations did not authorize the use of evidence in the form and manner in which it was presented herein. Such a burden had to be undertaken by Respondent. If, however, the Regulation permits the use of the evidence as presented to the BCNR, it would not only be contrary to the statute here under which it was promulgated, but would break new ground in proof of issues in any tribunal. It is not without significance that Respondent did not rely upon this or any other Regulation in the Court below. Petitioner below in his brief in support of his Motion for Rehearing, contrary to Respondent's footnote 8 on page 12 of its brief, did state that, "Plaintiff could not have had a fair and impartial hearing." Regulation 723.6(2) contains no pro-

vision which would remotely support the ugly practice adopted by BCNR in the instant case.

Petitioner invites the attention of the Court to the *Authority* for Sections 723.1 to 723.11 as issued under Section 207, 60 Stat. 837, as amended; 5 U.S.C. 191(a). The *Source* of Sections 723.1 to 723.11 appears at 17 F.R. 10243, *November 11, 1952.* (Italics supplied) Petitioner's application for correction of his naval record was filed with the Board for the Correction of Naval Records and it was dated July 8, 1952. The application was acknowledged as having been received by said Board on July 10, 1952. If the Regulation 723.6(2) allows or permits the practice about which Petitioner here complains, it would have no application to him, as it was promulgated *after* his application was filed in BCNR. (Italics supplied)

Respondent's position would not appear to be founded upon any apprehension as to these secret or non-secret advisory opinions being rendered by medical officers of the service for the use of BCNR. Further, Respondent appears contented with the thoroughness of the medical examinations given the Reserve Components of the services. However, the organization of Disabled American Veterans is in serious disagreement with Respondent as to these advisory opinions from military personnel and has consistently condemned the practice of the Boards seeking them and adopting them. The National Report of the DAV is printed pursuant to the authority of Public Law No. 249, 77th Congress, approved September 19, 1941. For the year 1956, 85 Congress, 1st Session, it became House Document No. 44. This Thirty-Sixth National Report stated: (p. 72)

> "All of the correction boards are still relying upon military doctors for advisory medical opinions. We have contended in the past, and it still is our contention, that complete justice cannot be dispensed in the face of such a practice. Congress stipulated that

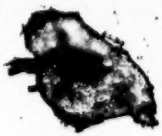
the correction boards would be composed of civilians. This stipulation has the sole purpose of removing the adjudication of cases involving error or injustice from under the jurisdiction of the military. Just so long as the correction boards have to rely upon the military for medical advice the intent of Congress will not be carried out in its fullest sense. *Since World War II the Armed Forces have been empowered to employ civilian medical consultants. There is no reason why such a practice cannot be adopted by the Department of Defense, upon whom all of the correction boards could draw for the medical advice they admittedly need.*" (Italics supplied)

It is shown in this Report (p. 73) that for the year 1956 DAV appeared in 101 Hearings before various Correction Boards for the 4 services. Clearly, this number constituted a relatively small number of such cases which went before these Correction Boards.

CONCLUSION

Respondent's opposition fails to provide any defense of the proceedings below upon the more substantial questions presented here. These, as we have urged, break new ground in a wide area affecting countless disabled Veterans of World War II. However, the *Proper* case, Supra (Pet. 16) was by a divided Court of three Judges to two Judges. Judge Littleton, who retired on November 1st, 1958, wrote the majority opinion. His vacancy has not been filled.

It is respectfully submitted that this petition for a writ of certiorari should be granted.



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